

RAYMOND A. BOWMAN, II
Claimant

KANSAS ELKS TRAINING CENTER (KETCH)
Respondent

TRAVELERS INSURANCE COMPANY
Insurance Carrier

KANSAS WORKERS COMPENSATION FUND

[illegible]

ORDER

APPEARANCES

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board.

ISSUES

What, if any, is the liability of the Kansas Workers Compensation Fund?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Respondent provides work services, job training, job placement and community living services for people with physical and mental disabilities. Claimant, a mentally disabled individual, was working for respondent when, on June 24, 1992, he fell from respondent's attic through a 10-foot suspended ceiling, landing on his back, fracturing vertebrae at T-12 through L-3. Additionally, claimant suffered neurological problems and bladder incontinence.

On March 23, 1995, claimant settled his claim against the respondent, at which time all issues against the Workers Compensation Fund were reserved for future determination.

At the time of the accident, claimant was working under the supervision of Harry Reid, respondent's manager. Mr. Reid, accompanied by Carol Leland, the president's secretary, had asked claimant to help him remove some boxes from a storage area in the attic. While in the attic, Mr. Reid advised claimant to remain on the stairs. Mr. Reid and Ms. Leland then turned their backs and, while their backs were turned, claimant came up the stairs into the attic and fell through the ceiling tiles to the floor below. There were no witnesses to the actual accident and, therefore, no one could testify as to why claimant came up the stairs and entered the attic and how claimant managed to fall through the ceiling tiles. Claimant did not testify in this matter.

The only person to testify in this matter was Patricia Knauff, respondent's vice president of human resources. Ms. Knauff was familiar with claimant and described him as being mentally retarded with an IQ below 70, which would put him at a higher functioning level than most mentally retarded individuals. Claimant could walk and carry on a conversation. However, when claimant walked, he was not fully in control, as his arms would flap and his gait was unsteady.

Ms. Knauff, who investigated the incident, speculated as to why claimant entered the attic against the instructions of Mr. Reid, but was not present at the time of the accident and could not testify specifically what happened on that date.

Respondent contends that claimant fell through the floor due to his inability to follow instructions as a result of his mental disabilities. Respondent further contends that

claimant's physical disabilities, i.e., his inability to walk with a controlled steady gait, also contributed to claimant's fall.

K.S.A. 1991 Supp. 44-567(a) provides:

(1) Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund.

K.S.A. 44-566(b) (Ensley) defines "handicapped employee" as:

. . . one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character that the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions:

. . . .

17. Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment.

The Administrative Law Judge, in reviewing K.S.A. 1991 Supp. 44-567, found significant the language of that statute, which focuses on the word "injury." K.S.A. 1991 Supp. 44-567 was amended in 1974, exchanging the word "accident" for the word "injury" in the statute. The Administrative Law Judge found that, while respondent proved claimant's accident, i.e., the event of falling through the ceiling, would not have occurred but for claimant's preexisting mental impairment, the physical change in claimant's body, the injury, occurred without regard to the preexisting mental retardation. This distinction focuses in on the language change in K.S.A. 1991 Supp. 44-567 in 1974. However, the Kansas Supreme Court, in Barke v. Archer Daniels Midland Co., 223 Kan. 313, 573 P.2d 1025 (1978), in considering that language change, found that, rather than limiting the liability of the Fund, the legislative modification was intended to expand the liability of the Fund. Consequently, rather than expanding the liability of the Fund, the Administrative Law Judge limited the Fund's liability based upon that language change. The Appeals Board finds this was not the intent of legislature in 1974. The Appeals Board, therefore,

finds that the legislative intent encompasses both claimant's accident and claimant's injury under K.S.A. 1991 Supp. 44-567.

The Appeals Board must next decide whether respondent has proven that the accident and/or the injury would not have occurred "but for" claimant's preexisting physical or mental impairment. The Fund does not contest that claimant was handicapped both physically and mentally. The Fund does, however, contend that there is no connection between claimant's handicap and claimant's fall through the ceiling. When claimant, Mr. Reid and Ms. Leland were in the attic, neither Ms. Leland nor Mr. Reid were watching claimant. They simply heard a noise, turned around, and claimant had fallen through the ceiling. There is no evidence as to why claimant left the stairs and went into the attic or how he happened to fall through the ceiling. Further, there is no evidence that claimant ever heard the instruction to remain on the stairs.

In order for respondent to be relieved of liability or to be entitled to an apportionment of the award from the Fund, the respondent has the burden of showing that the injury probably or most likely would not have occurred "but for" the preexisting handicap or that the injury was contributed to by the preexisting handicap. *Leiker v. Manor House, Inc.*, 203 Kan. 906, 457 P.2d 107 (1969); *McKinney v. General Motors Corp.*, 22 Kan. App. 2d 768, 921 P.2d 257 (1996).

Here, it is unknown whether claimant's mental or physical handicap caused him to stumble and fall onto the ceiling tiles. Likewise, there is no indication whether claimant lost his way in the dim light of the attic or merely tripped over some unidentified object in the attic, neither of which would pass liability on to the Kansas Workers Compensation Fund.

The Appeals Board finds the evidence insufficient to prove that claimant suffered accidental injury as a result of his preexisting handicap and respondent has failed in its burden of proving either that the injury probably or most likely would not have occurred but for the preexisting handicap or that the injury was contributed to by the preexisting handicap. The Appeals Board, therefore, finds that the decision by the Administrative Law Judge denying any liability against the Kansas Workers Compensation Fund should be affirmed, although on different grounds.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated May 24, 1999, should be, and is hereby, affirmed.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Ireland Court Reporting Transcript of Regular hearing	\$ 73.20
Bannon & Associates Deposition of Patricia Knauff	\$227.80

IT IS SO ORDERED.

Dated this ____ day of March 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Lyndon W. Vix, Wichita, KS
Christopher J. McCurdy, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director